Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ALLEN HEARD,

Petitioner,

v.

MARY BETH CALL and HEATHER CALL, a Minor, by and through her Next Friend, MARY BETH CALL,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a trial court's assessment of a $9.5 million dollar punitive damage award against a 19-year-old, prohibited from attending trial or offering testimony, and made in the absence of any determination of whether adequate procedural safeguards exist or were actually applied in this case violates petitioner's procedural due process rights under the Fourteenth Amendment.

2. Whether a $9.5 million dollar punitive damage award, in this alcohol-related multiple death case, made by a trial court against a 19-year-old, incarcerated at the time of trial for the deaths at issue and prohibited from attending or offering testimony, and made in the absence of any determination of whether the award was reasonable or necessary or could have been anticipated violated petitioner's substantive due process rights under the Fourteenth Amendment.

3. Whether a trial court's imposition of $9.5 million dollar compensatory and $9.5 million dollar punitive damage judgment against petitioner, incarcerated at the time of trial for the deaths at issue and prohibited by Missouri statute from attending the civil action for wrongful death violated petitioner's due process rights as guaranteed under the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner Joseph Allen Heard is an individual and Respondents Mary Beth Call and Heather Call are both individuals.

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PETITION FOR WRIT OF CERTIORI

Joseph Allen Heard respectfully petitions for a Writ of Certiorari to review the judgments of the Missouri Supreme Court and the Missouri trial court in this case.

OPINIONS BELOW

The opinion of the Missouri Supreme Court (App., *infra*, 1-33) is reported at 925 S.W.2d 840. The opinion of the Missouri Supreme Court denying rehearing (App., *infra*, 34) is unreported. The opinion of the trial court (App., *infra*, 35-38) is unreported.

JURISDICTION

The Missouri Supreme Court entered its judgment on June 25, 1996 (App., *infra*, 1-33). The Missouri Supreme Court denied Petitioner's request for rehearing on August 20, 1996 (App., *infra*, 34). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution which provides in pertinent part:

> *[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .*

U.S. Const. Amend. XIV, Section 1.

Missouri Revised Statutes Section 537.090 (1979) provides that a jury may consider the following in a wrongful death action:

> *The mitigating or aggravating circumstances attending the death may be considered by the trier of facts, but damages for grief and bereavement by reasons of the death shall not be recoverable.*

Missouri Revised Statutes Section 491.230.2 (1994) provides:

> *No person detained in a correctional facility of the department of corrections shall appear and attend or be caused to appear and attend any civil proceeding, regardless of whether he is a party, except in those instances in which the offender is a respondent in a chapter 211 proceeding to terminate parental rights.*

STATEMENT OF THE CASE

Petitioner Joseph Heard appealed to the Missouri Supreme Court from an adverse judgment in the court-tried case of $9.5 million in compensatory damages and $9.5 million in punitive damages for the wrongful death of three members and personal injury of two members of the Call family.

Petitioner requested reversal of the compensatory and punitive awards arguing that his due process rights under the Fourteenth Amendment were violated when the trial proceeded in his absence, over his objection, by virtue of Missouri Revised Statutes Section 491.230.2

which prohibited prisoners from attending any civil proceedings except a termination of parental rights. (Petitioner's Jurisdictional Statement and Brief.)

Petitioner also argued that the imposition of punitive damages violated his substantive and procedural due process rights under the Fourteenth Amendment. Petitioner argued Missouri lacked adequate procedural safeguards, asserting that Missouri Revised Statutes Section 537.090 violated the Fourteenth Amendment in allowing the imposition of punitive damages based on aggravating circumstances in a judge-tried case:

> *. . . as no judicial parameters of reasonableness and adequate guidance are afforded; as no requirements for consideration of mitigating factors such as criminal sanctions exist; as the statute allows for unlimited and unchecked judicial discretion not confined to deterrence and retribution; as no meaningful requirement of individualized assessment of appropriate deterrence and retribution exists; as no meaningful method or requirement of adequate trial and post-trial review exists.*

(Petitioner's Jurisdictional Statement and Brief). Petitioner requested reversal of the $9.5 million punitive damage award asserting that the trial court had not only denied him due process but had effectively precluded the opportunity for meaningful post-trial and appellate review.

The Missouri Supreme Court addressed these issues (App. *infra,* 1-33) but affirmed the trial court's judgment

in all but two respects.[1] The court initially sidestepped the issue of whether the statute prohibiting prisoners from attending civil proceedings was constitutional by declaring that as counsel for Petitioner did not make an *"offer of proof"* as to what Petitioner could offer at trial *"we cannot ascertain how Heard was prejudiced by operation of the statute, if at all. For this reason alone we cannot find that Heard's claims warrant reversal."* (App., *infra*, 5, 6.) The court declared the statute constitutional and denied Petitioner's request for a reversal in order to allow him to participate at trial in person or by deposition.

The court found Missouri's wrongful death statute and trial, post-trial and appellate procedures constitutional pursuant to *Haslip* and affirmed the punitive damage award against Petitioner. (App. *infra*, 9-16).

The court determined that a substantive review under *TXO* and *BMW* was unnecessary as the court stated *"in his briefs, Heard does not rest his due process challenge on an alleged claim of 'gross excessiveness,' but merely on the alleged absence of adequate controls and standards. We therefore find no reason to discuss TXO or BMW."* (App. *infra*, 11, footnote 4.)

In the court's *Haslip* analysis, it recited procedural protections afforded in jury trials (App. *infra*, 13-16) and factors that may be considered prior to imposing punitive damages (App., *infra* 13-15), yet conceded *"[w]hile perhaps*

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[1] The court reversed and remanded for correction as to the date prejudgment was to run from and the court reversed the damage awards in favor of Heather Call for the deaths of her siblings under the wrongful death statute allowing recovery to a surviving parent for the death of a child.

not as comprehensive as the Alabama criteria approved in Haslip, Missouri's requirements for the imposition of punitive damages, in conjunction with the various factors that may be considered, satisfy the due process concerns expressed by the Supreme Court." (App. *infra*, 15-16.) The court made no determination of whether any safeguards were applied in this case. (App. *infra*, 9-16.)

Petitioner filed a motion for rehearing contesting the court's determination that a substantive due process review was unnecessary. Petitioner advised the court that its opinion was in conflict with this Court's opinions of *Haslip*, *TXO* and *BMW* (Pet. Motion for Rehearing.) Petitioner argued that the court did not require consideration of criminal penalties or examine whether Petitioner could have had notice of the extent of potential exposure to multiple monstrous punitive damage awards. Petitioner advised the court that there exists no recorded affirmed award of punitive damages in a drunk driving, wrongful death case. (Pet. Motion for Rehearing). Petitioner also asserted that this case illustrates the constitutional frustration in focusing too heavily on the ratio between compensatory and punitive damages, wherein a trial court can merely inflate compensatory damages to meet, as here, a 1:1 ratio. (Pet. Motion for Rehearing).

The court denied the Motion for Rehearing without comment. (App., *infra*, 34.)

REASONS FOR GRANTING THE WRIT

At 19, Joseph Heard made a tragic and fatal mistake. He drove drunk one night in early summer, 1993 and caused a collision that resulted in the deaths of three and serious injury of two members of the Call family. He plead guilty to three counts of involuntary manslaughter and went to prison on three seven-year concurrent sentences. This case is not about his criminal punishment. This case is about how a lone trial judge, in a civil case brought by the surviving Call family members, single-handedly slapped the largest recorded punitive damage award against an individual drunk driver on a 19-year-old without affording the defendant a vestige of his procedural due process rights.

Though the drunk driver may be this country's current societal pariah, lower courts must adhere to the fundamental notions of fairness and justice before imposing severe and unprecedented punitive damages. Never before has this Court had occasion to review procedural due process protections for punitive damages awarded in *court-tried cases*. Never before has this court had occasion to review whether a punitive damage award *against an individual* is the result of unchecked judicial discretion and is so extreme that it shocks constitutional sensibilities. Yet, never before has the need been so timely or acute as this case begs for this Court's paradoxical reconciliation of the recognition of individual defendant's due process rights, no matter how unpopular or egregious the conduct, and society's current hunger for punishment against drunk drivers.

The need for this Court to clearly articulate the required application for the *Haslip* due process safeguards and standards to *court-imposed* punitive damage awards is urgent. Furthermore, the need for this Court to address the substantive due process concerns, including ratio and notice, raised recently by this Court in *BMW*, as applied to *individual defendants*, is imperative. As states heighten and tighten criminal penalties for drunk driving offenses, clear direction from this Court is crucial to require individualized assessments, case by case, as to whether punitive damages are necessary in the first instance, in the name of retribution and deterrence, and if so, in what lawful amount.

In the context of personal injury and death cases, lower courts must be forced to articulate and identify legitimate state interests to be furthered by the imposition of punitive damages. A clear mandate from this Court is essential to require lower courts to conduct a substantive review of whether punitive damage awards, whether assessed by juries or by courts, exceed an amount reasonable, rational or necessary to accomplish the recognized goals of retribution and deterrence.

In this case, the lower courts allowed imposition of $9.5 million compensatory damages and $9.5 million punitive damages against a 19-year-old prohibited by state statute from attending trial. The trial court record was barren of any recognition that the defendant had plead guilty and was currently serving three seven-year concurrent sentences in prison for the deaths at issue. The courts found no need to see or hear a word from this

young man before affirming the highest recorded punitive damage award ever in the state against an individual. The courts provided no articulation or rationalization of why this individual defendant deserved or needed the imposition of five punitive damage awards, the total of which exceed by 18 times the highest recorded affirmed punitive damage award in the state. No evidence of the defendant's net worth, or lack thereof was offered or required at trial. The Missouri Supreme Court readily conceded that the state lacked detailed procedural protections as were present in *Haslip*, yet summarily affirmed the punitive damage award.

Completely ignored were the substantive and procedural due process rights of Joseph Heard. Granted, his conduct was egregious, yet to allow lower courts to subvert individual defendant's rights and subject a state's citizen to monstrous punitive damage penalities without notice or precedent and, without so much as viewing or hearing the defendant, mocks all vestiges of fairness and justice.

THIS COURT SHOULD REQUIRE LOWER COURTS TO PROVIDE DETAILED DUE PROCESS REVIEW OF PROCEDURAL STANDARDS AND SAFEGUARDS FOR COURT-IMPOSED PUNITIVE DAMAGE AWARDS

Though *"[p]unitive damages have long been a part of traditional state tort law," Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1990), *quoting, Silkwood v. Kerr-McGee Corp.* 464 U.S. 238, 255 (1984), this Court has never

determined the constitutionality of punitive damages imposed by a trial court. The current need is acute.

This Court has determined that *"[o]ne must concede that unlimited jury discretion – or unlimited judicial discretion for that matter – in the fixing of the punitive damages may invite extreme results that jar one's constitutional sensibilities."* *Haslip*, 499 U.S. at 18 (emphasis added). *"General concerns of reasonableness and adequate guidance from the court"* properly enter into the constitutional calculus. *Id.* The trial and post-trial procedures approved in *Haslip* provide for detailed substantive review to ensure that punitive damages are reasonable, and do not *"exceed an amount that will accomplish society's goals of punishment and deterrence."* *Haslip* at 21.

In *Haslip*, this Court noted that the Alabama Supreme Court required trial courts to *reflect in the record* the reasons for interfering with a jury verdict *or refusing to do so* on the grounds of excessiveness of damages, and that factors appropriate for the trial court's consideration include, the culpability of the defendant's conduct, the desirability of discouraging others from similar conduct, the impact upon the parties, and the impact upon innocent third parties. *Haslip*, at 20.

The Missouri Supreme Court opinion is in conflict with *Haslip* as it declares Missouri's procedural protections constitutional yet Missouri statutes and common law do not require any meaningful individualized assessment of appropriate deterrence and retribution prior to imposing or affirming punitive damage awards.

Haslip clearly requires states to provide procedural protections that establish a significantly definite and

meaningful constraint on the discretion of fact finders in awarding punitive damages. *Haslip* at 18-24. Missouri's procedures, as demonstrated in this case, are fundamentally unfair because no aspect of the state court procedures supply a requisite check on the trial court's discretion. By summarily affirming an award of $9.5 million against a 19-year-old no court has seen or heard a word from, on a record devoid of any articulation or justification as to why this penalty was needed, clearly demonstrates Missouri lacks: (1) judicial parameters of reasonableness or adequate guidance; (2) lacks requirements for consideration of mitigation factors such as criminal sanctions; (3) allows for unchecked and unlimited judicial discretion not confined to deterrence and retribution; (4) lacks any meaningful requirement of individualized assessments of appropriate deterrence and retribution; and (5) lacks a meaningful method or requirement of adequate trial and post-trial review.

Missouri Revised Statutes Section 537.090 provides that a jury may consider the following in a wrongful death action:

> *The mitigating or aggravating circumstances attending the death may be considered by a trier of facts, but damages for grief and bereavement by reason of the death shall not be recoverable.*

The Missouri Supreme Court in *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. 1995) (en banc) determined that this statute is not unconstitutionally vague if *"subjected to proper narrowing jury instructions or other post-trial safeguards."*

Though the Missouri Supreme Court readily conceded Missouri's procedural protections were not as comprehensive as those approved by this Court in *Haslip*, (App., *infra*, at 15, 16), the court summarily affirmed the award in this case. The court articulated a variety of factors Missouri courts utilize in determining the propriety of a punitive damage award, including, the degree of malice or outrageousness of the defendant's conduct and evidence of a defendant's financial status. (App., *infra*, 13-15). Yet none of these factors are reflected in the record. Other relevant factors Missouri courts may consider include, the age of the injured party and the character of the defendant. (App., *infra*, 13-15). Again, the record is devoid of these factors being identified or utilized in this particular case. The jury trial protections recognized by the court, including remittitur and jury instructions, (App., *infra*, 14), are inapplicable to court-tried cases. Nowhere is there a single statement as to why a punitive damage award was necessary, and if so in this amount, in the name of deterrence and retribution, as to this 19-year-old already serving three seven-year sentences for the deaths at issue.

If the true purpose of punitive damages is retribution and deterrence, courts should be required to articulate and justify those reasons prior to imposing monstrous punitive damage awards. The two dissents filed in this case provide support as these justices recognize the injustice:

> *I cannot affirm the imposition of a $9.5 Million Dollar punitive damage award against this defendant, already imprisoned, without any apparent*

means of support, and already subject to a $9.5 Million Dollar compensatory damage award.

The facts of this case certainly warrant the imposition of punitive damages. Simply because the imposition of punitive damages are warranted, however, does not mean that they can be assessed in any amount. Recently decided cases from the United States Supreme Court establish that the amount of punitive damages assessed against the defendant must be carefully tailored to the particular facts at hand in accordance with specific standards to assure due process, [citing, BMW, Oberg, TXO, and *Haslip] Here it appears that the trial court assumed a 1:1 relationship between punitive and actual damages would pass constitutional muster. I do not believe this standard, alone, is sufficient. The record is wholly silent as to why this amount is necessary to further punish the defendant or to deter others from this type of admittedly outrageous conduct.*

(App., *infra*, at 29, 30.)

The other dissent declares:

I am of the opinion that the judgment so far departs from the regular and appropriate course of judicial proceedings that I cannot put my stamp of approval on it.

I dissent as to the award of actual and punitive damages under Part 3. I believe that the defendant, by raising claims about the methodology of determining punitive damages, effectively preserved a claim of excessiveness. I am forced to the conclusion that the trial judge allowed his outrage at the defendant's conduct and his sympathy of the bereaved to color his judgment and overlook the injunction of Section 539.090, RSMo. 1994, that "damages for grief and bereavement by reason of the death shall not be

recoverable." Inasmuch as the trial judge exercised the functions of both court and jury, this court's review is the only check on his excesses. Because the court does not reach the issue, I shall not compose an essay on the various factors that deserve consideration. Suffice it to say that the size of the award shocks my conscience to such an extent that I deem it plain error reviewable under Rule 84.13(c).

(App., *infra*, 31, 32.)

THIS COURT SHOULD REQUIRE LOWER COURTS TO PROVIDE SUBSTANTIVE DUE PROCESS REVIEW OF COURT-IMPOSED PUNITIVE DAMAGES AGAINST INDIVIDUALS AND TO MAKE MEANINGFUL INDIVIDUALIZED ASSESSMENTS TO ENSURE ANY AWARD IS REASONABLE, RATIONAL AND NECESSARY

This Court in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996) determined that punitive damages may properly be imposed to further a state's legitimate interest in punishing unlawful conduct and deterring its repetition. Most states authorizing exemplary damages afford juries latitude, requiring only that damages awarded be reasonably necessary to vindicate the state's legitimate interest in punishment and deterrence. Guidance from this Court is vital to require lower courts to abide by the same principles.

States have a legitimate interest in deterring drunk driving

This Court has recently described on several occasions how no one can seriously dispute the magnitude of

the drunk driving problem or the states' interest in eradicating it. *Michigan Department of State Police v. Sitz* 496 U.S. 444, (1990); *South Dakota v. Neville*, 459 U.S. 553 (1983); *Breithaupt v. Abrum*, 452 U.S. 432, 439 (1957) (*"the increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battle field"*); *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackman, J., concurring) (deploring *"traffic irresponsibility and the frightful carnage it spews upon our highways"*); *Perez v. Campbell*, 402 U.S. 637, 657, 672 (1971) (Blackman J., concurring); (Footnote omitted) (*"the slaughter on the highways of this Nation exceeds the death toll of all of our wars"*); *Mackey v. Montrym*, 443 U.S. 1, 17-19 (1979) (recognizing the *"compelling interest"* in highway safety).

Individual defendant's rights cannot be subverted, no matter how unpopular or egregious the conduct

Yet no matter how despised the drunk driver may be, he or she is still entitled to be afforded full due process protection before a court can impose an unprecedented, arbitrary award of punitive damages. *See National Treasury Employees Union v. VonRaab*, 489 U.S. 656 (1989) wherein Justice Scalia's dissent recognized the *"impairment of individual liberties cannot be the means of making a point."* In *Michigan Department of State Police v. Sitz*, 496, 444 (1990) this Court recognized that:

> *This is a case that is driven by nothing more than some symbolic state action – an insufficient justification for an otherwise unreasonable program of random seizures. Unfortunately, the court is transfixed by the wrong symbol – the illusory prospect of punishing countless intoxicated motorists – when it*

> *should keep its eyes on the road plainly marked by the Constitution.*
>
> *Id.* at 477.

The Missouri Supreme Court opinion conflicts with *BMW* as defendant had no notice he could be subject to a $9.5 million dollar punitive damage award

BMW establishes that elementary notions of fairness enshrined in our constitutional juris prudence require that an individual receive fair notice, not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose. *Id.*, at 1598.

Missouri citizens are on notice of potential criminal penalties for driving while intoxicated. However, no statutes or case law provided notice of the potential exposure to a $9.5 million punitive damage award, as there are no recorded affirmed decisions in Missouri awarding punitive damages in a drunk driving wrongful death case. The largest recorded affirmance of a punitive damage award is $500,000.00 for medical malpractice.

This Court determined that none of the statutes in *BMW* provided an out-of-state distributor with fair notice that the *first violation* might subject the offender to an multi-million dollar penalty:

> *Moreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment.*

> *. . . The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multi-million dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interest of Alabama consumers. In the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court in this case.*

BMW, 116 S. Ct. at 1603.

The $9.5 Million Dollar punitive award assessed against Mr. Heard is so grossly excessive that it constitutes a deprivation of property without due process of law.

This Court has recognized that regardless of what procedures are mandated by the Fourteenth Amendment there are also substantive constitutional limits beyond which penalties may not go. *Id.*, at 1610, *quoting, Seaboard Air Line Railway v. Seegers*, 207 U.S. 73, 78 (1907).

However, merely to ask whether a particular award of punitive damages is grossly excessive begs the question *"excessive in relation to what." TXO Production Corp. v. Alliance Resources Corp*, 113 S. Ct. 2711 (1993). *"When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for*

deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award." *TXO*, at 2725.

In *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2335 (1994) this Court determined that Oregon's denial of review of the size of punitive damage awards violated the Fourteenth Amendment Due Process Clause and recognized that judicial review of the size of punitive damage award has long been the safeguard against excessive verdicts.

> *If anything, the rise of large, interstate and multinational corporations have aggravated the problem of arbitrary awards of potentially biased juries. Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion on choosing amounts, and the presentation of evidence of a defendant's net worth creates a potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger.*
>
> *Oberg*, 114 S. Ct. at 2340, 2341.

The award is so excessive as to stray from any traditional notion of history and wide practice

This court has long noted the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require. *Schad v. Arizona*, 111 S. Ct. at 2491, 2500 (1991).

History and wide practice show punitive damage awards are rare

The United States Department of Justice recently issued its report entitled *Civil Jury Cases and Verdicts in Large Counties* concluding after following 762,000 tort, contract and real property cases for a 12 month period that plaintiffs were awarded punitive damages in only 6% of the cases that they won and received more than $50,000.00 in only half of those cases. The median punitive damage was $50,000.00.

In June, 1996 two Cornell University professors together with the National Center for State Courts released a study entitled *The Predictability of Punitive Damages* sponsored by a U.S. Department of Justice grant, concluding that punitive awards are generally modest and meted out in the most extreme circumstances. The Cornell study, which examined about 6,000 state court trials in 45 populous counties over a one year period, found that where compensatory damages were $10,000.00, punitive damages averaged $10,860.00; where compensatory damages were $100,000.00, punitive damages averaged $65,720.00; and where compensatory damages were $1,000,000.00, punitive damages averaged $397,810.00.

The Rand Institute for Civil Justice recently issued a report entitled *Trends in Civil Jury Verdicts Since 1985* analyzing trends in civil jury verdicts in 15 jurisdictions from 1985 to 1994. Several Missouri counties were analyzed showing the median punitive damages award from 1985-1989 to be: Jefferson County $15,000.00; St. Charles County $9,000.00; St. Louis City, $37,000.00; St.

Louis County, $20,000.00. From 1990 through 1994 the median punitive damage award (in 1992 dollars) was for Jefferson County, $40,000.00; St. Charles County, $8,000.00; St. Louis City, $103,000.00; and St. Louis County, $16,000.00.

Research discloses that the highest punitive damage award reviewed and affirmed by a Missouri appellate court is $500,000.00 for fraud, misrepresentation and conversion. The highest punitive damage award reviewed and affirmed by an appellate court involving wrongful death is $400,000.00 in a medical malpractice case. The award challenged here is 18 times higher than any punitive damages award ever upheld in Missouri in any type case involving punitive damages.

Accordingly, this award exceeds the bounds of contemporary and historical practice without compelling and particularized justification and accordingly is clearly arbitrary, excessive and therefore unconstitutional.

The punitive award assessed against Mr. Heard greatly exceeds any amount that might rationally be justified to deter similar conduct and further Missouri's legitimate goals in deterring drunk driving

A rational application of a deterrence theory produces a punitive damage award just sufficient to persuade individuals not to engage in the activity the state condemns. Overdeterrence can lead to ineffectiveness. The punitive award must bear some reasonable relationship to the purposes articulated by the state in assessing such punishment or it fails to satisfy the minimum

requirements of fundamental fairness mandated by the due process clause.

The ratio analysis in *BMW* is misapplied and creates excessive punishment and overdeterrence

The Missouri Supreme Court misapplied this Court's decisions in *Haslip* and *TXO* which endorse the proposition that a comparison between the compensatory award and the punitive award is significant. This case illustrates the constitutional frustration in focusing too heavily on the ratio. Here the ratio is 1:1. In a judge-tried case, a trial court need only artificially inflate the actual damage award to meet the *"ratio"* test. (App., *infra*, 29-30.) The Missouri Supreme Court refused to examine whether the ratio, in fact, was relevant, reasonable and rational.

Furthermore, where compensatory damages are high, even a 1:1 ratio punitive to compensatory damages might produce excessive punishment and overdeterrence. *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 810 (Utah 1991) (suggesting that the acceptable ratio of punitive to compensatory decreases as compensatory damages increase); (*Chandler v. Denton*, 741 P.2d 855, 868 (Okl. 1987) (where $600,000.00 compensatory award was *"ample and generous"* $500,000.00 punitive exaction was not responsive to purpose of civil punishment and should be reduced); *Memphis Community School District v. Stachura*, 477 U.S. 299, 312 (1986) (deterrence operates through mechanism of damages that are compensatory); *Smith v. Wade*, 461 U.S. 30, 94 (1983) (*"awards of compensatory damages and attorney's fees already provide significant deterrence"*).

THIS COURT SHOULD DECLARE THAT INCARCERATED INDIVIDUALS HAVE THE RIGHT TO BE PRESENT AND PARTICIPATE AT CIVIL TRIALS IN WHICH THEY ARE A DEFENDANT EXPOSED TO PUNITIVE DAMAGE AWARDS

Joseph Heard never got the opportunity to appear before the trial court so that the court could make a meaningful assessment of his demeanor, appearance and attitude before making a determination as to whether punitive damages were necessary. No adequate constitutional review can be conducted on such a record of the necessity of imposing punitive damages or potential excessiveness.

"Constitutional power to bring an accused to trial is fundamental to a scheme of ordered liberty and a prerequisite to social justice and peace." Riggins v. Nevada, 504 U.S. 127, 136 (1992) (Justice Brennan concurring). In *Riggins,* this Court noted that the side effects of ordered medication could have an impact upon the defendant's outward appearance as well as the content of his testimony on direct, cross-examination and his ability to follow the proceedings.

> *Efforts to prove or disprove actual prejudice from the records before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial court would have proceeded differently if he had not been given Mellarial. . . .*
>
> *At all stages of the proceedings, the defendant's behavior, manner, facial expressions and emotional*

> *responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, as Riggins did, his demeanor can have a great bearing on his credibility, persuasiveness, and on the degree to which he evokes sympathy.*

Id., at 137, 142. Prejudice can be acute during the sentencing phase of a proceeding when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. *Id.*, at 144. Guidance is now needed from this Court to ensure these protections exist for incarcerated individuals facing punitive damage awards in civil actions.

In *Illinois v. Allen*, 397 U.S. 337 (1970) this court recognized the right of a defendant to trial has long been *"cherished by the people as a vital restraint on the penal authority of government." Id.*, at 348 (Justice Brennan concurring). Justice Brennan lamented that this nation cannot endure if it falls short of the guarantees of liberty, justice and equality embodied in our founding documents and it:

> *cannot endure if we allow our precious heritage of ordered liberty to be ripped apart and made the sound and fury of our time. It cannot endure if individual cases the claims of social peace and order on the one side and of personal liberty on the other cannot be mutually resolved in the forum designated by the Constitution. If that resolution cannot be reached by judicial trial in a court of law, it will be reached elsewhere and by other means, and there will be grave danger and that liberty, equality, and the order essential to both will be lost.*

Id., at 348.

This Court has addressed whether a prisoner's presence may be necessary for a fair determination of the issues. *Price v. Johnston*, 334 U.S. 266, 280 (1947) (*"[e]xceptional situations may arise where a circuit court of appeals might fairly conclude that oral argument by a prisoner in person is "reasonably necessary in the interest of justice."); Bounds v. Smith*, 430 U.S. 817, 823 (1977) (*this Court noting that it is "now established beyond doubt that prisoners have a constitutional right of access to the courts"*); *Lisenba v. California*, 314 U.S. 219, 228 (1941) (refusing to allow the defendant to be present at any stage of the proceedings so infused the trial with unfairness as to deny due process of law.)

In *Rock v. Arkansas*, 483 U.S. 43 (1987) this court recognized the right to appear and participate in a trial reaches *"beyond the criminal trial"* as *"the procedural due process constitutionally required in some extrajudicial proceeding includes the right of the affected person to testify." See, Gagnon v. Scarpelli*, 411 U.S. 778, 782, 786 (1973) (probation revocation); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (termination of welfare benefits).

This Court recognizes there are few subjects which this Court and other courts have been more nearly unanimous than in *"their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Ohio v. Roberts*, 488 U.S. 56, 78 (1980) (Justice Brennan dissent) *quoting Pointer v. Texas*, 380 U.S. 400, 405 (1965).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[SEAL]

SUPREME COURT OF MISSOURI

EN BANC

MARY BETH CALL, et al., Respondents, v. JOSEPH ALLEN HEARD, Appellant.	)	No. 78455 (Filed Jun. 25, 1996)

APPEAL FROM THE CIRCUIT COURT
OF COLE COUNTY

The Honorable Thomas J. Brown, III, Judge

Joseph Heard appeals from a judgment in this court-tried case awarding $9.5 million in compensatory damages and $9.5 million in punitive damages for the wrongful deaths of Richard, Beth, and Daniel Call. Our jurisdiction is based upon Article V, § 3, of the Missouri Constitution, because Heard challenges the validity of a state statute.[1] We affirm in part and reverse in part.

I.

On June 22, 1993, Appellant Joseph Heard, then 19, purchased beer at Mike's Corner Pocket in Jefferson City using an altered driver's license. After drinking approximately two six-packs, he went to his pickup truck and

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[1] Respondents have filed a motion objecting to our jurisdiction. Appellant has filed a motion to strike portions of Respondents' brief. We overrule both motions.

began driving home along Cole County Route B. About the same time, Richard and Mary Beth Call and their three children, Beth, Daniel, and Heather, left a softball game and began their drive home. Their route took them along Cole County Route B as well, but in the opposite direction of Heard. The two vehicles collided when Heard's truck crossed the center line into the Calls' lane. As a result of the accident, Richard, Beth, and Daniel Call were killed, and Mary Beth and Heather Call were injured.

Heard was arrested and pled guilty to three counts of involuntary manslaughter. He was sentenced to seven years in prison. At all times during the pendency of this case he was incarcerated.

On June 25, 1994, Mary Beth and Heather Call filed suit against Heard for their own injuries and for the wrongful deaths of Richard, Daniel, and Beth Call. The Calls, with notice to defense counsel, but without leave of court, took Heard's deposition on August, 22, 1994. Defense counsel did not attend the deposition, and it was stricken for failure by plaintiffs to obtain leave of court as required by Rule 57.03(a).

The case was set for trial on July 18, 1995. One week before, on July 11, 1995, Heard requested a writ of habeas corpus ad testificandum in order to allow him to testify at the trial. The next day the trial court issued the writ. Thereafter, on July 17, 1995, the Department of Corrections, citing § 491.230.2, RSMo 1994, indicated its intention not to release Heard. Then on the day of trial, Heard requested a continuance until he could secure his release or until his videotaped deposition could be obtained.

Despite allegations that he would be denied his constitutional rights, the motion was denied.

At trial, the Calls presented evidence that moments before the accident another driver had almost been run off the same road by someone in a truck matching the description of Heard's truck. Evidence was also introduced that Heard crossed the center line, that he was driving while intoxicated, and that he pled guilty to the criminal charges arising from the verdict. Heard called no witnesses, and the only evidence he presented was to read admissions against interest made by Mary Beth Call. The trial court, sitting without a jury, found in favor of the Calls, assessed 100% of the fault to Heard, and further found that Heard's actions warranted the imposition of punitive damages. The court then assessed damages in the following amounts:

Count I (wrongful death of Richard Call):

Compensatory Damages: $2.5 million

Aggravated/Punitive Damages: $2.5 million

Apportioned $2.5 million to each Mary and Heather Call

Count II (wrongful death of Beth Call):

Compensatory Damages: $2.5 million

Aggravated/Punitive Damages: $2.5 million

Apportioned $2.5 million to each Mary and Heather Call

Count III (wrongful death of Daniel Call):

Compensatory Damages: $2.5 million

Aggravated/Punitive Damages: $2.5 million

Apportioned $2.5 million to each Mary and Heather Call

Count V (personal injuries to Heather Call):

Actual Damages: $500,000

Punitive Damages: $500,000

Count VI (personal injuries to Mary Beth Call):

Actual Damages: $1.5 million

Punitive Damages: $1.5 million.

Heard now appeals, alleging as his primary points the following: 1) that § 491.230.2, RSMo 1994, pertaining to the attendance of incarcerated persons at civil proceedings, is unconstitutional; 2) that the imposition of punitive damages violates due process; 3) that Heather Call did not have statutory authority to pursue a claim for the wrongful deaths of her siblings; and 4) that prejudgment interest should not have been awarded.

II.

In relevant part, § 491.230.2, RSMo 1994, states:

> No person detained in a correctional facility of the department of corrections shall appear and attend or be caused to appear and attend any civil proceeding, regardless of whether he is a party, except in those instances in which the

offender is a respondent in a chapter 211 proceeding to terminate parental rights.[2]

In three separate points relied on, Heard challenges § 491.230.2, RSMo 1994, as violative of the Missouri Constitution. he cites Article I, § 14 (open access to the courts), Article I, § 12 (writ of habeas corpus shall never be suspended), Article II, § 1 (separation of powers), and Article I, § 10 (due process). He also contends that the statute is unconstitutional under the 14th Amendment of the United States Constitution (due process and equal protection). In evaluating these issues, we are mindful of the rule of construction that statutes are presumed constitutional. *State v. Schleiermacher,* ___ S.W.2d ___ (Mo. banc 1996) (No. 78072, decided May 28, 1996, slip op. at 9).

Initially, we note that Heard failed to present an offer of proof regarding the substance of his testimony. Appellate courts will not guess at what the evidence will show, but are instead bound by what the "cold record" reflects. Without an offer of proof, we cannot ascertain how Heard was prejudiced by the operation of the statute, if at all. For this reason alone, we cannot find that Heard's claims of error warrant reversal.

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[2] The legislature has amended the statute so that it now allows an incarcerated person to attended [sic] a civil proceeding if the incarcerated person "is a party to the civil proceeding and the court finds that the offender will be substantially and irreparably prejudiced by his failure to attend a trial on the merits in the civil proceeding." § 491.230.2(2), RSMo Supp. 1995.

Heard first claims that the statute prevents him from gaining access to the courts. Certainly, there is no question that a constitutional right to access to the courts exists and that the prison system may not unduly interfere with a prisoner's access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821-23 (1977). However, this does not mean that a prisoner is entitled to perfect access; a prisoner is entitled, instead, to meaningful access. *Id.* at 823. For that reason, it does not automatically follow that the right of access to the courts encompasses a right to personally appear at a civil trial. *Fruit v. Norris*, 905 F.2d 1147, 1150 n. 6 (8th Cir. 1990); *State ex rel. Kittrell v. Carr*, 878 S.W.2d 859 (Mo. App. 1994). Of the dozens of cases, both state and federal, that have addressed this issue, none has ruled otherwise. Jay M. Zitter, Annotation, *State Prisoner's Right to Personally Appear at Civil Trial to which he is a Party-State Court Cases*, 82 A.L.R. 4th 1063 (1990) (citing cases). Moreover, it is well-established that constitutionally sufficient access can be afforded by means other than the live presence at trial of the person in question. *See, e.g., State ex rel. Taylor v. Dorsey*, 914 P.2d 773, 777 (Wa. App. 1996); *Throndset v. Hawkenson*, 532 N.W.2d 394, 397 (N.D. 1995); *In the Interest of C.G.*, 885 P.2d 355, 357 (Co. App. 1994). In Missouri, prisoners can testify either by conventional deposition or by videotaped deposition. Rule 57.07(a)(3)(B). In fact, on a prisoner's request, the trial judge may, in his or her discretion, conduct a bench trial within the prison in cases where the prisoner is a party. § 544.275, RSMo 1994. Given the significant alternatives to a prisoner's live presence at the courthouse, we hold that § 491.230.2 does not deprive a prisoner of meaningful access to the courts.

Heard argues alternatively that the trial judge denied him meaningful access by failing to afford him the alternatives to a personal appearance mentioned above. This claim is more properly couched as an objection to the denial of the day-of-trial motion for continuance. The record shows that Heard had almost thirteen months from the date the case was filed and three months from the date the trial setting was announced to secure a deposition or to request that the trial be held where he was incarcerated. Instead, just one week before trial, Heard requested a writ of habeas corpus which, although granted by the trial judge, was not honored by the Department of Corrections. As stated, after failing to obtain his release pursuant to the writ, he then requested a continuance to take his deposition. A decision to grant a continuance is within the sound discretion of the trial court. *State v. Brown*, 902 S.W.2d 278, 289 (Mo. banc) *cert. denied* ___ U.S. ___, 116 S.Ct. 679 (1995). This Court will not disturb the exercise of that discretion where it is apparent, as here, that the party should have been more diligent in preserving his or her testimony, having had ample time to do so. Although we find no abuse of discretion in this case, we observe that as a general proposition, trial judges should make reasonable and practicable efforts to accommodate the needs of prisoners for alternatives to live testimony.

In the next sub-issue, Heard states that the statute violates both the equal protection and due process clauses in two respects: (1) that the statute unlawfully draws a distinction between prisoners and other types of "legally disabled" persons by denying prisoners access to

the courts, while affording access to those other persons; and (2) that the statute acts to deny him the right of access to the courts, which is a fundamental right.

Heard cites no authority that prisoners constitute a suspect class. By all accounts, the status of suspect class in the law of equal protection is reserved for classifications of race, national origin, and illegitimacy. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991). Therefore, § 491.230.2 will survive constitutional attacks so long as it is rationally related to a legitimate state interest. *Id.* In view of the obvious security and administrative concerns involved in transporting prisoners to and from courthouses, we conclude that the statute meets the rational relationship test.

Having already determined that the statute does not deprive Heard of his right to access to the courts, there is no need to revisit the issue in the context of equal protection. Suffice it to say, once again, that the right of access is satisfied by the presence of sufficient alternatives to a personal appearance.

In his next two points, Heard argues that § 491.230.2, RSMo 1994, is unconstitutional because it suspends the writ of habeas corpus, and, as a result, it also violates the constitutional provision for separation of powers. In taking this position, Heard disregards the fact that the trial judge actually issued a writ of habeas corpus ad testificandum as requested, and that it was the Department of Corrections that refused to honor it. The trial judge, having done all that was asked of him, committed no error. The proper remedy to compel satisfaction of the

habeas corpus writ was to proceed against the superintendent either with an action for contempt, *State ex rel. Rudolph v. Ryan*, 385 S.W.2d 717 (Mo. banc 1931), or a petition for writ of mandamus. *See e.g. Murphy v. State*, 873 S.W.2d 231, 232 (Mo. banc 1994) (mandamus can be used to compel Department of Corrections to compute jail time). The failure to pursue these remedies, combined with the lack of an offer of proof, compels us to deny the points without reaching the constitutional question.

III.

In the next point of error, Heard challenges the award of punitive damages on the ground that Missouri's procedures for the award and review of punitive damages under the wrongful death statute violate the due process clause. In particular, he claims that in a judge-tried case "no judicial parameters of reasonableness and adequate guidance are afforded."[3]

As a preliminary matter, the Calls contend that Heard has failed to preserve for appellate review the punitive damages issue raised before us because he failed to present it to the trial court. Generally, constitutional issues must be raised at the earliest opportunity if they are to be preserved for review. *Fahy v. Dresser Industries, Inc.*, 740

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[3] Heard has not briefed the question of whether the time has come for Missouri to adopt the "clear and convincing" evidence standard for punitive damages. *See Kansas City v. Keene Corp.*, 855 S.W.2d 360 (Mo. banc 1993) (Holstein, J. concurring); and *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo. banc 1990) (Robertson, J., concurring). Therefore, we do not reach this issue.

S.W.2d 635, 639 (Mo. 1987). This is necessary in order to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue. *Winston v. Reorganized Sch. Dist. R-2, Etc.*, 636 S.W.2d 324, 327 (Mo. banc 1982). The record herein reflects that the issue of punitive damages did not enter the case until the day of trial, at which time the Calls made their initial request for the award of punitive damages. Heard raised his constitutional due process challenge of the award in his motion for new trial. Plaintiffs had the opportunity to respond and the trial court had the opportunity to address the issue; thus the purposes of the rule were met. The due process issue was adequately raised before the trial court; it is therefore proper for this Court to address it.

On the merits, we begin with the recognition that the Due Process Clause of the 14th Amendment to the United States Constitution imposes limitations upon awards of punitive damages. *Honda Motor Co. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 2335 (1994). In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1990), the United States Supreme Court attempted to articulate those limitations in order to prevent punitive damages from "run[ning] wild." While no "mathematical bright line" exists to determine the constitutionality of a punitive damage award, limitations upon the discretion of the finder of fact and "general concerns of reasonableness . . . enter into the constitutional calculus." *Haslip*, 499 U.S. at 18. For the purposes of this case, the Due Process Clause requires that adequate standards and controls be in place to prevent an award of

punitive damages from becoming an arbitrary deprivation of property. *Haslip*, 499 U.S. at 18-22.[4]

Although the Supreme Court has not mandated specific standards and controls, it has indicated that in general, common law procedures pass constitutional muster. *Haslip*, 499 U.S. at 15. As noted in *Haslip:*

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Id.

In *Haslip*, the Supreme Court examined and approved Alabama's procedures and requirements in upholding a punitive damages award. *Id.* at 19-24. The jury was instructed that the purpose of punitives is to punish the defendant and to deter the defendant and others from similar conduct in the future. *Id.* at 19. The trial judge, in reviewing the award, then considered the culpability of

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[4] In *TXO Production Corp. v. Alliance Resources Corp.*, 503 U.S. 443 (1993), and *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 64 U.S.L.W. 4335 (May 20, 1996), the United States Supreme Court explored the possibility that a punitive damage award that is "grossly excessive" in relation to the state's interest in punishment and deterrence may violate due process despite the presence of adequate controls and standards for imposition and review of the award. 64 U.S.L.W. at 4343. In his briefs, Heard does not rest his due process challenge on an alleged claim of "gross excessiveness," but merely on the alleged absence of adequate controls and standards. We therefore find no reason to discuss *TXO* or *BMW*.

the defendant, the desirability of discouraging others from similar conduct, the impact upon the parties, and "other factors, such as the impact on innocent third parties." *Id.* at 20. Finally, an appellate court reviewed the award to make sure that it "does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.' " *Id.* at 21 (quoting *Green Oil Co. v. Hornsby,* 539 So.2d 218, 222 (Ala. 1989)). The appellate court's criteria for considering whether the award was excessive were:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 499 U.S. at 21-22.

In contrast, the Supreme Court struck down a punitive damage award imposed in an Oregon state court because the review procedures were inadequate. *Honda Motor Co. v. Oberg,* ___ U.S. ___, 114 S.Ct. 2331, 2341

(1994). Under Oregon law, an appellate court could only reverse a punitive damage award if there was no evidence to support it; in other words, the presence of any evidence to support the award precluded the appellate court from reversing or reducing the award. *Oberg*, 114 S.Ct. at 2338. This method of review, according to the Supreme Court, did not provide adequate protection from arbitrary awards. *Id.* at 2341.

With these cases in mind, we must now determine whether Missouri's procedures, controls, and standards for imposing and reviewing punitive damages in a court-tried case satisfy due process. In this regard, § 537.090, RSMo 1994, provides that in wrongful death cases "the mitigating and aggravating circumstances attending the death may be considered by the trier of facts" in assessing damages. This Court recently explained that aggravating circumstance damages in wrongful death cases are the equivalent of punitive damages and that due process safeguards are required. *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 466 (Mo. banc 1995). In Missouri, punitive damages may be awarded if the defendant "showed complete indifference to or a conscious disregard for the safety of others." *Stojkovic v. Weller*, 802 S.W.2d 152, 155 (Mo. banc 1991). The well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct. *Vaughn v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. banc 1986). The requirements for the threshold showing of "complete indifference . . ." and the purposes of punishment and deterrence are reflected in the mandatory punitive damages instruction, MAI 10.02, which states:

> If you find in favor of plaintiff under Instruction Number ___, and if you believe the conduct of defendant as submitted in Instruction Number ___, showed complete indifference to or conscious disregard for the safety of others, then in addition to any damages to which you may find plaintiff entitled under Instruction Number ___, you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

When punitive damages are awarded by a jury, both the trial court, which has the power of remittitur, § 510.263, RSMo 1994, and the appellate court review the award to ensure that it is not an abuse of discretion. Of course, in a judge-tried case, the role of the jury is subsumed into the role of the judge, and the judge performs both functions. On appellate review, an abuse of discretion is established when the punitive damage award is so disproportionate to the factors relevant to the size of the award that it reveals "improper motives or a clear absence of the honest exercise of judgment." *Beggs v. Universal C.I.T. Credit Corporation*, 409 S.W.2d 719, 724 (Mo. 1966). In other words, the amount of punitive damages must somehow be related to the wrongful act and the actual or potential injury resulting therefrom, although there is no fixed mathematical relation between the amount of actual damages and the amount of punitive damages awarded. *Id.*

These requirements constitute what *Haslip* calls the "traditional common law approach," which generally is sufficient to satisfy due process. *Haslip*, 499 U.S. at 15.

Under these requirements, punitive damages are limited by the purposes for which they may be imposed, that is, to punish and to deter. These requirements prevent imposition of awards that are arbitrary and, if not present, would violate due process. *Haslip*, 499 U.S. at 19-20.

To supplement the requirements set out above for imposition of punitive damages, the courts of this state have identified a variety of factors, a nonexclusive list, that may also be considered in determining the propriety of an award. Certainly a critical factor is the degree of malice or outrageousness of the defendant's conduct. *State ex rel. St. Joseph Belt Co. v. Shain*, 108 S.W.2d 351, 356 (Mo. 1931). In addition, aggravating and mitigating circumstances may be considered not only under the wrongful death statute, but in all other cases involving punitive damages. *Beggs*, 409 S.W.2d at 724. Furthermore, evidence of a defendant's financial status is admissible as an indication of the amount of damages necessary to punish the defendant. *Id.* at 724. Among other relevant factors are: the age of the injured party, *State ex rel. St. Joseph Belt Co.*, 108 S.W.2d at 356; the character of the defendant, *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 662 (Mo. App. 1991); and the character of the injured party, *Holcroft v. MKT RR Co.*, 607 S.W.2d 158, 164 (Mo. App. 1980). *See also, Moore v. Missouri-Nebraska Exp., Inc.*, 892 S.W.2d 719, 724 (Mo. App. 1994), for a compilation of factors.

While perhaps not as comprehensive as the Alabama criteria approved in *Haslip*, Missouri's requirements for the imposition of punitive damages, in conjunction with the various factors that may be considered, satisfy the due process concerns expressed by the Supreme Court. In so ruling, we fully address Heard's claim that "no judicial

parameters of reasonableness and adequate guidance are afforded." Heard brings no claim that the awards in this case were excessive.

IV.

For his next point (Point VI in the brief), Heard raises a conglomeration of issues including: (A) Heather Call's authority under the wrongful death statute to bring the actions in Counts II and III for the death of her siblings; (B) the sufficiency of the evidence to support the punitive damage awards: (C) the refusal of the trial court to allow defense attorneys to cross-examine Mary Beth Call about her remarriage; and (D) error in the mathematical calculation of the damages. We will address each issue in turn despite the patent impropriety of joining these issues in a single point of error.

A.

Both Heather Call and her mother, Mary Beth Call, were named party plaintiffs in Counts II and III alleging the wrongful deaths of Beth and Daniel Call, respectively. The trial court assessed damages in the amount of $5 million ($2.5 million compensatory and $2.5 million punitive) for each count. These damages were then apportioned equally between Heather Call and her mother.

Under § 537.080.1, RSMo 1994, however, Heather Call is precluded from participating in Counts II and III. Paragraph (1) of the statute specifies that the spouse or children of the deceased comprise the class of persons who

may bring a wrongful death action. Paragraph (2) provides that if no persons in paragraph (1) are entitled to bring an action, then a brother or sister of the deceased may bring the action. In all cases, only one action may be brought against any one defendant for the death of any one person. § 537.080.2, RSMo 1994. Therefore, under the statute, Heather Call could not bring suit for the wrongful deaths of her siblings because her mother, Mary Beth Call, brought the action as the sole class member under paragraph (1).

Despite the clear language of the statute, Heard made no objection to Heather Call's participation in her siblings' wrongful death counts until this appeal. The Calls argue that Heard was required to raise the issue of Heather Call's right to participate in those counts "by specific negative averment" as required under Rule 55.13. That rule, however, applies to challenges to a party's capacity to sue, that is, "the right to come into court which exists if one is free of general disability, such as infancy or insanity. . . . " *Earls v. King*, 785 S.W.2d 741, 743 (Mo. App. 1990). There is no question here as to Heather Call's capacity to sue; thus, Rule 55.13 is inapposite.

The essence of Heard's contention that Heather Call was statutorily foreclosed from participating in Counts II and III of the wrongful death action is that she failed to state a claim upon which relief can be granted. It is imperative, in order to state a claim, that the plaintiffs both plead and prove that they are authorized to bring an action under the wrongful death statute. This is a component of the claim no less than any other component. As this Court stated long ago:

> A party suing under the [wrongful death] statute . . . must bring himself in his pleading and proof strictly within the statutory requirements necessary to confer the right. Otherwise his petition states no cause of action, and his proof is insufficient to sustain his judgment.

Nelms v. Bright, 299 S.W.2d 483, 487 (Mo. banc 1957) (brackets in original), *citing Chandler v. Chicago & Alton Railroad Company*, 158 S.W. 35, 37 (Mo. 1913). *See also, Klein v. Abramson*, 513 S.W.2d 714, 716 (Mo. App. 1974); *Deming v. Williams*, 321 S.W.2d 720, 723 (Mo. App. 1959); *Lynch v. St. Louis Public Service Co.*, 261 S.W.2d 521, 523 (Mo. App. 1953).

Failure to state a claim is jurisdictional in nature and may be raised at any time. *Commercial Bank of St. Louis Co. v. James*, 658 S.W.2d 17, 21 (Mo. banc 1983); Rule 55.27(g)(2). In this case, because Heather Call could not under any circumstances prove that she had a statutory right to participate in the wrongful death counts for her siblings, she failed to state a claim under those counts.

Respondents, in a fall-back position, characterize this lapse as a mere technicality that should not affect the total amount of the awards on Counts II and III. Rather, as they explain, only the apportionment should be reversed, and Mary Beth Call should receive the entire $5 million in compensatory and punitive damages for each count. In making this argument, Respondents necessarily assume that the trial court would have returned damages in the amount of $5 million on each of the counts in question even if Heather Call had not been a party plaintiff. To the contrary, the record does not support that assumption.

Section 537.090, RSMo 1994, sets out the factors to be considered by the fact finder in determining what the damages should be:

> [T]he trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which *those on whose behalf suit may be brought* have been deprived by reason of such death. . . .

(emphasis added). The statute is clear that in determining damages, the fact finder considers losses with reference to the particular persons on whose behalf the suit was brought and the relationship of the deceased with those particular persons. In other words, an element of the total damages is based upon the relationship between the deceased and each individual party to this action.[5]

Naturally, we must presume that the trial court, in determining the damages on Counts II and III, followed

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[5] In *Sullivan v. Carlisle*, 851 S.W.2d 510, 513 (Mo. banc 1993), this Court noted that Missouri's initial wrongful death statute was of the traditional "Lord Campbell" type, under which damages were "measured by the economic and emotional losses arising out of the disruption *of the survivors' relationship with the deceased*." (emphasis added). Although the statute has been substantially altered, the current statute still retains this intrinsic characteristic. For a general discussion of the history of the wrongful death statute and the damages for which it provides, see *Sullivan v. Carlisle*, 851 S.W.2d at 513-514.

the dictates of § 537.090. The trial court, in other words, presumably took into account Heather Call's particular pecuniary losses and personal deprivation in arriving at its determination of $2.5 million compensatory damages on each count. Indeed, the record makes very clear that the trial court must have considered Heather Call's losses with respect to these counts, in light of the fact that the court then went on to apportion the damages, half-and-half, between Heather Call and her mother. This apportionment was undertaken pursuant to § 537.095.3, RSMo 1994, which provides that the trial court shall apportion damages in proportion to the losses suffered by each party entitled to the damages. As stated, however, consideration of any of Heather Call's losses with respect to arriving at a damage figure was inappropriate because she was foreclosed from participating in those counts of the suit. Her loss, her "deprivation," should not have been considered in the total amount of damages.

The damages suffered by Heather Call must be deleted from the total because, based on the record before us, the damages were personal to her and could not have been awarded to anyone else. Consequently, the awards of compensatory damages to Heather Call under Counts II and III were erroneous. The awards of punitive damages to Heather Call, which were based on the awards of compensatory damages and imposed in a one-to-one ratio, were likewise erroneous. Mary Beth Call should be the sole recipient of the total damages remaining – $2.5 million – for each count.

We arrive at this conclusion notwithstanding our decision in *Grothe v. St. Louis-San Francisco Railway Co.*, 460 S.W.2d 711 (Mo. 1970). The Calls cite *Grothe* for the

proposition that the total damage award on Counts II and III need not be reduced, but only the apportionment altered. *Grothe* involved a constitutional challenge to the trial court's power to apportion an award in a wrongful death case. Essentially, the Court determined that an erroneous apportionment of an award did not prejudice the defendant because his monetary obligation, the total amount of the judgment, would be the same regardless of the eventual apportionment. However, the plaintiffs in *Grothe* were all members of the same class and therefore entitled to participate in the suit, unlike the present case. Thus, in *Grothe* there was no concern that the total damage amount was erroneous due to the inclusion of damages personal to a party who was not entitled to bring suit under the statute.

B.

The second issue raised in this point of error is whether there was sufficient evidence to support the award of punitive damages. Heard argues that the awards were based solely on evidence of intoxication and that such evidence alone cannot justify punitive damages.

As stated in part III, punitive damages may be awarded if the defendant "showed complete indifference to or a conscious disregard for the safety of others." *Stojkovic v. Weller,* 802 S.W.2d 152, 155 (Mo. banc 1991). This will be met if it is proved that the defendant knew or had reason to know of the high probability that his actions would result in injury. *Id.* In *Stojkovic,* the Court determined that evidence of the driver's intoxication, plus evidence of erratic driving, would be sufficient to

meet the above standard. In this case, as in *Stojkovic*, there is ample evidence of erratic driving, evidence that demonstrates a reckless disregard of consequences. The trial court found that immediately prior to the accident Heard had crossed the center line and ran another car off the road. The accident at issue was caused when Heard's truck crossed the center line into the Calls' lane. In fact, the accident reconstructionist testified that Heard's truck had gone onto the opposite shoulder and that he was most likely swerving back over to his proper lane when the accident occurred. This evidence, in combination with Heard's intoxication, is sufficient to support an award of punitive damages. *Id.* Punitive damages were not awarded solely on the basis of intoxication as Heard claims. The point is denied.

C.

Heard also takes issue with the trial court's refusal to allow him to cross-examine Mary Beth Call about her remarriage, claiming such evidence should have been considered in mitigation of damages. Although this particular argument was not specifically mentioned in his point relied on, we will consider it since it is at least related to the question of whether the evidence supported the award of damages.

Generally evidence relating to remarriage of a plaintiff in a wrongful death case is to be excluded. *Glick v. Allstate Insurance Company*, 435 S.W.2d 17, 23 (Mo. App. 1968). Heard, however maintains that plaintiffs waived any objections to testimony regarding Mary Beth Call's

remarriage because plaintiffs "opened the door" by submitting a psychological report regarding Mary Beth Call which mentioned, among other things, that she had found comfort in her remarriage.

When an improper subject of inquiry has been voluntarily broached by one party, the other party is permitted to further examine the subject. *Watson v. Lanvatter*, 517 S.W.2d 117, 122 (Mo. banc 1974). Assuming that plaintiffs, by offering the psychological report, indeed "broached" the subject of Mary Beth Call's marriage, then arguably Heard should have been allowed to question her further on the subject. However, Heard's offer of proof merely indicated that he would have solicited testimony as to the date of Mary Beth Call's remarriage on April 8, 1995, and the approximate time her relationship began with her current husband, which was during June of 1994. This testimony does little more than establish the fact of the remarriage, and even though such evidence may be introduced for some other legitimate purpose, it is still not to be considered in the determination of damages. *Glick*, 437 S.W.2d at 23. In any event, Heard has failed to show how he was prejudiced by the exclusion of this evidence, especially since it is far from apparent that the evidence, even if relevant in mitigation of damages, would be of sufficient weight to have affected the amount of damages awarded.

D.

Finally, Heard notices in a passing sentence that the damages found by the court in the five claims totalled $19 million, but the last paragraph of the judgment states the

total judgment as only $18.1 million. Heard fails to explain why a mere mathematical error should be grounds for reversal. It is unnecessary to address this issue further because, in any event, on remand, the trial court must recalculate damages in accordance with this opinion.

V.

Finally, Heard claims that the trial court erred in awarding prejudgment interest in this matter. Prejudgment interest in tort actions is authorized under § 408.040.2, which states as follows:

> In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest . . . shall be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier.

On October 13, 1994, plaintiffs sent by certified mail a demand letter that read in pertinent part as follows:

> Finally, pursuant to § 408.040, RSMo. (1986), please let this letter serve as a settlement demand in the sum of $10 million to resolve all of the wrongful death and personal injury actions arising from this tragedy. . . . This offer

> shall be left open for 60 days unless earlier rejected.

The pleadings made no explicit request for prejudgment interest nor was evidence presented on the issue at trial. The trial court, however, while the case was under submission, granted plaintiffs leave to amend their petition to include the allegation of demand and a prayer for prejudgment interest and to reopen the evidence to introduced [sic] their demand letter.

Assuming, without deciding, that it was improper to reopen the case to allow amendment of the pleadings, we must decide whether claims for prejudgment interest must be expressly pled in the first place. Heard relies on *Chambers by Abel v. Rice*, 858 S.W.2d 230, 232 (Mo. App. 1993), and *Pilley v. K-Mart Corp.*, 849 S.W.2d 293, 299 (Mo. App. 1993), in which it was held that a petition must state facts sufficient to authorize the award of prejudgment interest. In reaching this holding in the *Pilley* case, the Court of Appeals, Southern District, cited *Folk v. Countryside Casualty Co.*, 686 S.W.2d 882 (Mo. App. 1985), and *Parker v. National Foundation Life Ins. Co.*, 805 S.W.2d 195 (Mo. App. 1991), for the proposition that a specific allegation was necessary in order to obtain prejudgment interest under § 408.020, that allows for prejudgment interest in contract actions. The *Pilley* court reasoned that parties seeking prejudgment interest under § 408.040.2 for a tort action should be held to the same pleading requirements as those seeking interest under § 408.020 in a contract action, and therefore specific allegations would be required.

Despite the precedent of *Folk* and *Parker*, it is hardly settled law that § 408.020 requires an express allegation in contract cases. In fact, the greater weight of authority supports the opposite conclusion. See, e.g. *Dierker Assoc., D.C., P.C. v. Gillis*, 859 S.W.2d 737, 746 (Mo. App. 1993); *Holtmeir v. Dayani*, 862 S.W.2d 391, 406 (Mo. App. 1993); *Addison v. Jester*, 758 S.W.2d 454, 460 (Mo. App. 1988); *General Aggregate Corp. v. LaBrayere*, 666 S.W.2d 901, 910 (Mo. App. 1984); *Haynes v. Allen*, 482 S.W.2d 85, 89 (Mo. App. 1972). In all of these cases, a petition that included an open-ended prayer of relief, such as " . . . and for such other relief as the Court seems just and proper," was a sufficient basis upon which to award prejudgment interest. More recently, the United States District court, in *Gibson v. Musil*, 844 F. Supp. 1579 (E.D. Mo. 1994), while acknowledging *Chambers* and *Pilley*, and the cases on which they rely, held that the pleadings in a tort action need not contain specific allegations or an express prayer for relief because neither is required under § 408.020 or § 408.040.2. *Id.* at 1582.

We agree with the reasoning in *Gibson*. The statute contains no pleading requirement; therefore, an open-ended prayer of relief will suffice. In this case, the prayers for each count of the petition call for damages "and for such other and further relief as this court deems just and proper under the circumstances." This language provides a sufficient basis for awarding prejudgment interest.

Heard challenges the trial court's award of prejudgment interest on other grounds as well. Without going into detail, Heard argues that the Rules of Civil Procedure prohibit the court from reopening the trial. This is

simply incorrect. It is well settled that the trial court has the discretion to reopen the case to allow plaintiff to admit additional evidence. *See, e.g., Page v. Lewis,* 902 S.W.2d 359 (Mo. App. 1995).

Heard also contends that the Calls' demand letter is legally insufficient to give rise to the right to prejudgment interest because there was no indication within the letter as to how the demand amount was to be allocated between the various claims. *Lester v. Sayles,* 850 S.W.2d 858 (Mo. banc 1993), on which Heard relies, in no way lends support to Heard's contention. In fact, the Court made clear that it was not deciding the necessity of allocating the demand among multiple claims. In this case, now that we are squarely confronted with the issue, we find nothing in the statute that precludes plaintiffs from combining demands on multiple claims into a single sum.

In his last point, Heard is correct in his claims that the trial court erred in awarding prejudgment interest from the date of the demand letter. Plaintiffs concede that calculating the interest from that date is erroneous as § 408.040, RSMo 1994, does not allow for prejudgment interest until 60 days after the demand was made. Thus, the judgment must be modified to provide that prejudgment interest runs only from December 12, 1994.

VI.

On all counts, the judgment of the trial court is reversed to the extent that the awards of prejudgment interest exceeded the amount authorized by law. On Counts II and III, the judgment of the trial court is

reversed as to the award of damages to Heather Call only. In all other respects the judgment of the trial court is affirmed. The case is remanded for entry of judgment in accordance with this opinion.

/s/ _____
Stephen N. Limbaugh, Jr.,
Judge

Holstein, C.J., Benton, Covington and White, JJ., concur; Price, J., concurs in part and dissents in part in separate opinion filed; Blackmar, Sr.J., concurs in party and dissents in part in separate opinion filed. Robertson, J., not sitting.

[SEAL]

Supreme Court of Missouri

en banc

MARY BETH CALL, et al., Respondents, v. JOSEPH ALLEN HEARD, Appellant.	)	No. 78455 (Filed Jun. 25, 1996)

OPINION CONCURRING IN PART AND DISSENTING IN PART

I concur with the majority opinion, except part III. I cannot affirm the imposition of a $9.5 million dollar punitive damage award against this defendant, already imprisoned, without any apparent means of support, and already subject to a $9.5 million dollar compensatory damage award.

The facts of this case certainly warrant the imposition of punitive damages. Simply because the imposition of punitive damages are warranted, however, does not mean that they can be assessed in any amount. Recently decided cases from the United States Supreme Court establish that the amount of punitive damages assessed against a defendant must be carefully tailored to the particular facts at hand in accordance with specific standards to assure due process. *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 64 U.S.L.W. 4335 (May 20, 1996); *Honda Motor Co. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 2335 (1994); *TXO Production Corp. v. Alliance Resources Corp.*,

503 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1990).

Here, it appears that the trial court assumed a one to one relationship between punitive and actual damages would pass constitutional muster. I do not believe that this standard, alone, is sufficient. The record is wholly silent as to why this amount is necessary to further punish the defendant or to deter others from this type of admittedly outrageous conduct.

In contrast to the majority, I believe this issue was sufficiently raised in defendant's general due process challenge and I would remand for reconsideration.

William Ray Price, Jr.,
Judge

[SEAL]

Supreme Court of Missouri

en banc

MARY BETH CALL, et al., Respondents	)	No. 78455
v.	)	(Filed Jun 25, 1996)
JOSEPH ALLEN HEARD, Appellant	)	

OPINION CONCURRING IN PART AND DISSENTING IN PART

I am of the opinion that the judgment so far departs from the regular and appropriate course of judicial proceedings that I cannot put my stamp of approval on it. I hope that lawyers and judges who come across this case in the future will realize that possibly valid points were not raised in the trial court or preserved for review, because the defendant's original counsel virtually abandoned him and successor counsel, though making diligent efforts, came in only after most of the damage was done.

I concur in the result reached in Count II. Had the defendant given any indication that he had valuable testimony, I believe that it would have been an abuse of discretion for the court to deny him the opportunity to testify by deposition. This is especially so when the court gave the plaintiffs the opportunity to reopen their case to present their claim for prejudgment interest.

I dissent as to the award of actual and punitive damages under Part III. I believe that the defendant, by raising claims about the methodology of determining punitive damages, effectively preserved a claim of excessiveness. I am forced to the conclusion that the trial judge allowed his outrage at the defendant's conduct and his sympathy for the bereaved to color his judgment and overlooked the injunction of sec. 537.090, RSMo 1994, that "damages for grief and bereavement by reason of the death shall not be recoverable." Inasmuch as the trial judge exercised the functions of both court and jury, this Court's review is the only check on his excesses. Because the Court does not reach the issue, I shall not compose an essay on the various factors that deserve consideration. Suffice it to say that the size of the award shocks my conscience to such an extent that I deem it plain error reviewable under Rule 84.13(c). The error taints the award of actual damages, except as to the award of personal injury damages to both respondents. I would solve the problem by vacating the awards of damages for wrongful death and remanding for reconsideration. In the remand order the Court should prescribe some standards for guidance.

I concur with all parts of Part IV of the opinion.

In the view I take it would not be necessary to reach the matters discussed in Part V but, since the Court considers the issue, I cannot fully concur. I agree that there is no need to allocate a settlement offer among the several potential claimants to the unitary award for wrongful death under Sec. 537.080 RSMo 1994. The settlement can come first and the allocation afterwards. I cannot, however, endorse the propriety of a lump sum offer

for the claims of plural claimants for damages for their own personal injuries. Such an award poses an ethical problem for plaintiffs' counsel who represent several clients who unite in a single lawsuit, because no judicial machinery is available for allocation. A separate offer for each severable claim should be required.

For the reasons stated I would vacate the monetary portions of the award and would remand the case with directions to reconsider. On remand I would allow the defendant to testify by deposition.

CHARLES B. BLACKMAR
Senior Judge

[SEAL]

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August 20, 1996

Ms. Susan Ford Robertson
609 East Walnut
Columbia, Missouri 65201

In re: Mary Beth Call, et al. vs. Joseph Heard
Supreme Court No. 78455

Dear Ms. Robertson:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Robertson, J., not participating.

Yours very truly,

THOMAS F. SIMON

/s/ Christina S. Vinson
Christina S. Vinson
Deputy Clerk, Court en Banc

cc: Ronald R. McMillin

IN THE CIRCUIT COURT OF
COLE COUNTY, MISSOURI

MARY BETH CALL, et al.,	)	
Plaintiffs,	)	Case No. CV194-0733CC
vs.	)	
JOSEPH ALLEN HEARD,	)	(Filed Jul 20, 1995)
Defendant.	)	

JUDGMENT

On July 18, 1995, this cause is called for trial. Plaintiffs appear by counsel, Ronald R. McMillin and Charles J. McPheeters, and defendant appears by counsel, Thomas R. McDonnell. Opening statements are made. Evidence is adduced from the plaintiffs, who rest, and then from the defendant, who rests. Closing argument is heard.

The Court finds in favor of the plaintiffs on the issue of liability, assessing 100% of the fault against the defendant, Joseph Allen Heard, and 0% of the fault against plaintiffs or plaintiffs' decedents.

The Court further finds sufficient evidence of reckless indifference to others, aggravating circumstances and actions on the part of the defendant which require an award of punitive and exemplary damages, including but not limited to the following:

That the defendant, a 19-year-old possessed with a drivers license which had been altered so as to indicate that defendant's age was over 21, had been drinking

alcohol throughout the late afternoon and evening, drinking a minimum of twelve beers and admitting having purchased and consumed beer at a Jefferson City tavern; that the defendant was legally intoxicated, with a blood alcohol content of 0.18 percent; that the defendant, although he was in an intoxicated condition, drove his vehicle; that the defendant failed to be aware of a substantial and unjustifiable risk of collision and death by his driving in an intoxicated condition, and that his failure constituted a gross deviation from the standard of care which a reasonable person could exercise in the situation; that while driving in an intoxicated condition defendant ran at least one vehicle off the road before colliding with the plaintiffs' vehicle and killing the plaintiffs' decedents; that the intoxicated defendant drove in a manner constituting a gross deviation from the reasonable standard of care, in that he crossed over the centerline and drove into oncoming traffic, killing Richard Call, Daniel Call, and Beth Call, and causing severe and continuing physical and emotional injury to Mary Beth Call and Heather Call.

In light of the foregoing, the Court finds and enters judgment as follows:

On Count I, plaintiffs' claim for the wrongful death of Richard C. Call, the Court finds in favor of plaintiffs Mary Beth Call and Heather Call and assesses damages as follows:

For Compensatory Damages: $2.5 million

For Aggravated/Punitive Damages: $2.5 million

Apportioned as Follows: Mary Beth Call

$2.5 million

Heather Call

$2.5 million

On Count II, plaintiffs' claim for the wrongful death of Beth M. Call, the Court finds in favor of plaintiffs Mary Beth Call and Heather Call and assesses damages as follows:

For Compensatory Damages: $2.5 million

For Aggravated/Punitive Damages: $2.5 million

Apportioned as Follows: Mary Beth Call

$2.5 million

Heather Call

$2.5 million

On Count III, plaintiffs' claim for the wrongful death of Daniel Z. Call, the Court finds in favor of plaintiffs Mary Beth Call and Heather Call and assesses damages as follows:

For Compensatory Damages: $2.5 million

For Aggravated/Punitive Damages: $2.5 million

Apportioned as Follows: Mary Beth Call

$2.5 million

Heather Call

$2.5 million

On Count V, plaintiffs' claim for personal injuries to Heather Call, the Court finds in favor of plaintiff Heather Call and assesses damages as follows:

For Actual Damages: $500,000

For Punitive Damages: $500,000

On Count VI, plaintiffs' claim for personal injuries to Mary Beth Call, the Court finds in favor of plaintiff Mary Beth Call and assesses damages as follows:

For Actual Damages: $1.5 million

For Punitive Damages: $1.5 million

Plaintiffs also are granted leave to reopen the evidence solely to file their demand letter pursuant to § 408.040, RSMo., 1994, and each count of their petition is hereby amended to include the allegation of demand and prayer for prejudgment interest.

IT IS THEREFORE ORDERED that plaintiffs have judgment against defendant with damages as set forth above in the total amount of $18.1 million; prejudgment interest from October 13, 1994; and their costs herein expended. Let execution issue therefore.

Dated: July 20, 1995.

/s/ Thomas J. Brown, III
Thomas J. Brown, III
Judge

Supreme Court, U.S.
FILED
DEC 19 1996
CLERK

(2)

No. 96-797

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ALLEN HEARD,

Petitioner,

v.

MARY BETH CALL and HEATHER CALL, a Minor, by and through her Next Friend, MARY BETH CALL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF IN OPPOSITION

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14 pp

RESTATEMENT OF QUESTIONS PRESENTED

1. Do Missouri's procedures for awarding and reviewing the award of punitive damages in a triple-homicide wrongful death case adequately protect the due process rights of defendants against whom punitive damages are assessed pursuant to state statute?

2. Should a defendant who commits a vehicular triple homicide and injures two others while intoxicated have a right to expect he will be free from statutorily-permitted punitive damages that mirror the reprehensibility of his conduct?

3. Does an incarcerated defendant have a due process right to be present in a distant civil courtroom when he and his attorneys fail to take advantage of a myriad of alternative methods of insuring his meaningful participation in the proceedings?

4. Should certiorari be available to a litigant when his complaints are the product of his own actions and those of his insurer and counsel and, as a result, resolution of the preceding questions would not alter the outcome of the lower court proceedings?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondents Mary Beth and Heather Call respectfully request this Court deny the petition for writ of certiorari which seeks review of the opinion of the Missouri Supreme Court found at 925 S.W.2d 840 (Mo. banc 1996).

RESTATEMENT OF THE CASE

Petitioner's statement of the case bears little resemblance to the actual course of events in the circuit and appellate courts of Missouri following the vehicular deaths of Richard Call, Daniel Call and Beth Call and the serious physical and emotional injuries inflicted on respondents Mary Beth and Heather Call by the petitioner. This same infirmity was evident in the state Supreme Court and reflected in its opinion but apparently has gone uncured. An account, consistent with the actual record, follows.

Respondents filed a multi-count petition for personal injury and wrongful death on June 23, 1994, after petitioner, a drunken 19-year-old with an altered driver's license, crossed the centerline on a rural Missouri highway and killed a father and two children, leaving the mother and surviving daughter with serious physical and emotional injuries. The petition sought both compensatory and punitive damages, the latter triggered by "aggravating circumstances" under Missouri's wrongful death statute in that petitioner's actions while driving drunk were willful and wanton and in conscious disregard for the safety of others.

Petitioner's insurance company hired a law firm in St. Louis, Missouri, some 140 miles away, to defend him. Petitioner's lawyers filed an answer on his behalf, but on the same day and in the same proceeding filed a separate petition on behalf of the insurance company asking that it be relieved of any further duty to defend him. (These two cases were later severed for trial but counsel maintained the dual representation of insurer and insured until appeal in late 1995 despite the clear conflict of interests.)

As part of respondent's discovery, petitioner and his attorneys were served with a timely notice of deposition at petitioner's place of incarceration in Boonville, Missouri. His counsel made no attempt to quash the deposition notice and did not attend, but later succeeded in quashing the deposition pursuant to a special court rule not applicable here. Regardless however, they made no effort to preserve their client's testimony for trial, either by deposition transcript or videotape. They also failed to answer interrogatories propounded to petitioner, leading to an order of default against petitioner which the court later withdrew, allowing the case to continue. On April 17, 1995 the court set the matter for trial to begin July 18, 1995. All parties waived a trial by jury.

Not until a week before trial did petitioner attempt to obtain a writ that would allow him to attend the trial in person. Upon receipt of the application for the writ of habeas corpus, respondent's counsel told petitioner's attorneys that Missouri law prevented the state Department of Corrections from producing an inmate at a civil trial, except in limited circumstances unrelated to this matter. At the time of trial the statute provided that "No

person detained in a correctional facility of the department of corrections shall appear and attend or be caused to appear and attend any civil proceeding, regardless of whether he is a party, except in those instances in which the offender is a respondent in a chapter 211 proceeding to terminate parental rights." Section 491.230.2 RSMo (1994). The trial court, aware of the statutory limitations placed on the Department of Corrections by § 491.230.2, issued the writ anyway. The Department of Corrections then declined to obey the writ, citing the statute.

Petitioner made no attempt to enforce the writ, to move the trial to petitioner's place of incarceration, or to testify by an eleventh-hour deposition. Not until the morning of trial did petitioner's lawyers move for a continuance in order to take his deposition. The motion, untimely under Missouri law, was denied.

At trial, petitioner put on no evidence save for a brief recitation of so-called "admissions" from the deposition of Mary Beth Call. His only defense consisted of arguments that the carnage he caused could have been avoided had only Richard Call gotten out of his way. Nor did petitioner proffer any evidence in mitigation of any punitive damage award, his burden under Missouri law. Nor did his attorneys seek to invoke any relief accorded to him by state civil procedures for court-tried cases, such as keeping the record open for inclusion of additional evidence. The court entered judgment in favor of respondents and awarded equal amounts of compensatory and punitive damages.

On direct appeal to the Supreme Court of Missouri under its exclusive jurisdiction to decide the constitutionality of a state statute, petitioner argued *inter alia* he was unconstitutionally denied access to the courts and that punitive damages in court-tried cases are unconstitutional. The Missouri high court rejected those arguments and affirmed a slightly altered judgment in favor of respondents, one judge noting that petitioner's attorneys "virtually abandoned him" during the entire pendency of this case. This petition for writ of certiorari followed.

REASONS TO DENY THE WRIT

Reserved for securing review of some compelling issue, a writ should not issue from this Court to save lawyers and insurance companies from the consequences of, as the Missouri Supreme Court said, abandoning an insured. One can only speculate the effect on the verdict had the insurance company expended as much effort defending the insured through trial as it has on appeal trying to negate that judgment and avoid the obligation for its satisfaction. The real motivation for this petition, then, is to preempt attempts to satisfy that judgment.

Advancing that goal, counsel voices due process concerns of insufficient notice of the potentiality of punitive damages, insufficient standards for setting and reviewing punitive damage awards and the statutory limitations on an inmate's right to be present at a civil trial in which he is a party.

Devoid of legal merit, these ostensible reasons should also be rejected because they would not affect the

judgment in that they are the product of petitioner's own making, particularly the errors and omissions of those purporting to act on his behalf.

Regardless, the judgment against petitioner satisfies the dictates of *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996), and its precursors in this Court by balancing reasonableness, ratio and reprehensibility. The Supreme Court of Missouri applied the required standards of review and, because any perceived slight in the denial of petitioner's "presence" at trial was entirely the fault of petitioner's own attorneys, this Court should deny the petition for a writ.

MISSOURI'S PROCEDURES FOR REVIEWING PUNITIVE DAMAGE AWARDS IN COURT-TRIED CASES ARE CONSTITUTIONALLY SOUND, AS THEY PROVIDE DETAILED REVIEW OF STANDARDS AND SAFEGUARD A DEFENDANT'S DUE PROCESS RIGHTS

The trial court was cited to and guided by Missouri's pattern instructions which call for punitive damages to be awarded if defendant's conduct "showed complete indifference to or conscious disregard for the safety of others" and in such a sum as the trier of fact believes "will serve to punish defendant and to deter defendant and others from like conduct." This is the first step in the "traditional common law approach" to punitive damages, an approach which satisfies due process. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). The remainder of the due process requirements under *Haslip*, such as a record of the grounds for a punitive damage award, were also satisfied in that the trial court's judgment specifically

listed 11 separate acts of the petitioner that would individually, or in combination, support the award.

Petitioner next took the issue to the state Supreme Court, where factors such as the degree of malice or outrageousness of defendant's conduct, aggravating circumstances, and the age and character of the injured parties were again considered with attendant extensive briefing and argument, thereby satisfying the *Haslip* "due process concerns expressed by the [U.S.] Supreme Court." *Call v. Heard*, 925 S.W.2d 840, 849-50 (Mo. banc 1996). The punitive damage award was supported by evidence that petitioner "showed complete indifference to or a conscious disregard for the safety" of the Call family, that he was reckless, drunk and driving erratically. *Id.* at 852. Petitioner now claims the punitive damage award was unconstitutionally "excessive." This is a claim he never raised before this petition for writ of certiorari. *Id.* at 850.

While petitioner is unhappy with the judgment against him, his recourse is against others and not respondents for any deprivation of his rights. Since the opinion of the Supreme Court of Missouri does not conflict with any decision of this Court, no compelling reason exists for the issuance of a writ of certiorari.

NO CONSTITUTIONAL REQUIREMENT FORCES A PLAINTIFF TO PRESENT EVIDENCE OF MITIGATING FACTORS OR OF A DEFENDANT'S FINANCIAL WORTH TO SUPPORT PUNITIVE DAMAGES, AND THE BURDEN OF PRODUCING EVIDENCE OF PENURY OR ANY OTHER MITIGATING FACTOR IS BORNE BY THE DEFENDANT UNDER MISSOURI LAW.

Petitioner also complains that the trial court failed to consider any mitigating factors that might have reduced or eliminated the award of punitive damages despite offering virtually no evidence save for some "admissions" read from the deposition of Mary Beth Call. Petitioner's mother was in the courtroom during trial and could have been called as a witness. Petitioner could have appeared by deposition transcript or videotape. Character witnesses could have been called or affidavits offered. He chose to do none of those things.

Now claiming penury as a mitigating factor, petitioner offered no such evidence. Evidence of net worth is not a prerequisite to punitive damages. *Elam v. Alcolac*, 765 S.W.2d 42 (Mo.App. W.D. 1988). Petitioner has the burden of injecting and offering evidence in mitigation, including financial status, but failed to do so.

One excuse offered for the first time here is lack of notice that punitive damages could be awarded in wrongful death actions. Indeed, on the morning of trial, petitioner's counsel argued to the court that punitive damages were not allowed under Missouri's wrongful death statute, apparently unaware of the decision of Missouri's high court in *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. banc 1995), handed down

three months before trial, in which aggravating circumstance damages were specifically held to be punitive in nature, requiring a separate verdict. Until then, while still considered "punitive in nature," such damages had been lumped together with other damages delineated in the statute.

That this change did not occur until early 1995 confirms yet another misleading statement of petitioner, here at page 19: "Research discloses that the highest punitive damage award reviewed and affirmed by a Missouri appellate court is $500,000.00." First, that isn't true. *See, e.g., Elam*, 765 S.W.2d 42 (Mo.App. W.D. 1988), holding the trial court should not have overturned a punitive damage award of $43 million dollars in a toxic tort suit. Secondly, pre-*Bennett*, Missouri's courts have affirmed million-dollar awards that considered aggravating circumstances as part of a single damage award. *See, e.g., Morrissey v. Welsh Co.*, holding an award of $6.5 million dollars under Missouri's wrongful death statute was not so large as to be deemed excessive, and *Blum v. Airport Terminal Services, Inc.*, 762 S.W.2d 67 (Mo.App. E.D. 1988), holding that a one million dollar award to parents of a co-pilot in airplane crash was not excessive.

Nevertheless, petitioner seizes upon the lack of mitigation evidence at trial, ignoring the aggravating factors presented to the trial court. He claims this case should be governed by the language of *BMW*, but overlooks some of this Court's most telling language in that opinion, that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly

150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.' " *BMW*, 116 S.Ct. at 1599, citing *Day v. Woodworth*, 13 How. 363, 371 (1852). Unlike the tortfeasor in *BMW*, this petitioner did not fail to disclose a bad paint job that in many states would not even be actionable. His tort was the wrongful death of a father and two children coupled with the infliction of serious physical and emotional trauma on the two surviving members of the family. Unlike here, BMW challenged the size of the award throughout state court proceedings and did not raise it for the first time before this Court.

A PRISONER HAS NO RECOGNIZED DUE PROCESS RIGHT TO BE PRESENT PHYSICALLY AT A CIVIL TRIAL

Petitioner failed to take advantage of the panoply of alternatives to his physical presence in court that are afforded to him under Missouri law, and now tries to shift the blame to a supposed constitutional infirmity of § 491.230.2 RSMo (1994). He could have had a meaningful presence in court by presenting his deposition testimony. He did not. As petitioner now seems so concerned with his facial expressions, he could have presented a videotaped deposition. He did not. He could have presented a more meaningful defense than the one used at trial, which was to blame the deceased for failing to get out of his way. He did not. He could have requested that the record of the bench trial remain open for additional evidence, including his deposition. He did not.

A prisoner is not entitled to perfect access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821-23 (1977); *Price*

v. Johnston, 334 U.S. 266, 285-86 (1948). He is entitled to meaningful access, which is generally satisfied by the appearance of counsel, *see, e.g., Stone v. Morris*, 546 F.2d 730, 735 (7th Cir. 1976), or by the presentation of deposition testimony. *See, e.g., Throndset v. Hawkenson*, 532 N.W.2d 394, 397 (N.Dak. 1995). While petitioner may be able to argue in another forum that he was denied meaningful access by his own counsel, that argument is not for this Court at this time.

The state's interest in economy, safety and continued incarceration of its prisoners sufficiently shows a rational relationship between the statute and a legitimate state interest. *State v. Williams*, 729 S.W.2d 197 (Mo. banc 1987).

CONCLUSION

For the foregoing reasons, all of which show there is no compelling issue presented in petitioner's request, the petition for writ of certiorari should be denied.

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